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IN THE

Supreme Court of the United States

STACY FRY AND BRENT FRY,
AS NEXT FRIENDS OF MINOR E.F.,

Petitioners,

v.

NAPOLEON COMMUNITY SCHOOLS, *et. al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF *AMICUS CURIAE* FOR THE COUNCIL OF PARENT ATTORNEYS AND ADVOCATES AND ADVOCATES FOR CHILDREN OF NEW YORK IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Council of Parent Attorneys and Advocates ("COPAA") is a not-for-profit organization for parents of children with disabilities, their attorneys and advocates.[1] COPAA believes effective educational programs for children with disabilities can only be developed and implemented with collaboration between parents and educators as equal parties. COPAA does not represent children but provides resources, training, and information for parents, advocates, and attorneys to assist in obtaining the free appropriate public education ("FAPE") such children are entitled to under the Individuals with Disabilities Education Act ("IDEA" or "Act"), 20 U.S.C. § 1400, *et seq.* Our attorney members represent children in civil rights matters. COPAA also supports individuals with disabilities, their parents, and advocates, in attempts to safeguard the civil rights guaranteed to those individuals under federal laws, including the Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. §1983) ("Section 1983"), Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("Section 504") and Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.* ("ADA").

COPAA brings to the Court the unique perspective of parents and advocates for children with disabilities. Many of these children experience significant challenges. Their success depends not only on the right to secure the IDEA's

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1. Pursuant to this Court's Rule 37.6, no part of this brief was authored by counsel for any party, and no person or entity other than the *Amici* listed here or its members made any monetary contribution to the preparation or submission of the brief. The parties both filed blanket consents for amicus curiae briefs on August 2, 2016.

guarantee of a FAPE, but also upon the enjoyment of all rights under federal law guaranteed to students, whether or not they receive special education.

Advocates for Children of New York ("AFC") is a legal services organization that has worked with low-income families for over forty years to secure quality and equal public education services for children in New York City. AFC provides a range of direct services, including free individual case advocacy under IDEA and Section 504, and also works on institutional reform of educational policies and practices through advocacy and litigation.

Because of their work involving education of students with disabilities, *Amici* are intimately familiar with IDEA's exhaustion requirement and the profound differences and similarities of the legal claims and remedies available under IDEA and ADA/504. We are greatly concerned that parents and children should not be required to waste scarce time, money, and other resources on the unnecessary hurdle of wasteful IDEA due process hearings when there are no IDEA claims but there has been discrimination. In these circumstances, they could obtain relief for their discrimination claims more quickly, more efficiently, and with less cost by proceeding directly with their ADA/504 cases. Requiring parents to pursue due process hearings, which cannot provide them with meaningful relief, harms children. They often face discrimination and are deprived of their rights for potentially years during an unnecessary detour through IDEA due process.

SUMMARY OF ARGUMENT

IDEA is a very different statute from ADA and Section 504. Reading the Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372 ("HCPA"), now codified at 20 U.S.C. § 1415(*l*), to require exhaustion in all discrimination cases that deal with students or educational environments confuses and conflates the entirely different processes, standards, and purposes of these acts. Such a reading is inappropriate and erroneous.

IDEA provides a strong entitlement to an Individualized Educational Program ("IEP") with appropriate special education and related services regardless of cost to the school district. IDEA also provides strong procedural protections. There are claims for which IDEA provides appropriate remedies, and claims for which it cannot. To require exhaustion even when IDEA procedures **cannot resolve the harms at issue or provide meaningful relief** will have significant due process and practical consequences that are detrimental to students with disabilities seeking to vindicate their Section 504/ADA rights. Congress passed HCPA to ensure that students do not lose their right to bring their non-IDEA civil rights claims when they enter the schoolhouse door. Abandoning the remedy and claim centered inquiries set out in the plain language of 20 U.S.C. Section 1415(*l*) is not only erroneous, it eviscerates HCPA. Students with disabilities like E.F. who are undisputedly receiving IDEA FAPE may still have Section 504 and ADA claims that do not involve the right to receive FAPE under IDEA and are therefore not seeking relief available under it.

The Sixth Circuit's decision essentially requires exhaustion in all cases where a student with a disability raises discrimination claims related to an educational environment solely because the plaintiff happens to be a student with disabilities who may have an IEP. **Under that standard, virtually all Section 504/ADA claims involving public school students would require exhaustion under IDEA, a different statute.** This is at odds with plain statutory language and the clear legislative intent, and will create onerous, time-consuming, expensive, and confusing procedural hurdles that will hinder families in vindicating distinct ADA/504 rights.

ARGUMENT

I. FAMILIES OF CHILDREN WITH DISABILITIES WILL NOT FOREGO THE ROBUST IDEA PROTECTIONS WHEN SAID PROTECTIONS ARE ACHIEVABLE AND APPROPRIATE

The Sixth Circuit warned that students with disabilities and their families would "evade the exhaustion requirement [of 20 U.S.C. § 1415(*l*)] simply by 'appending a claim for damages." *Fry v. Napoleon Cmty. Sch.*, 788 F.3d 622, 630 (6th Cir. 2015), *cert. granted*, 136 S. Ct. 2540 (2016). This concern lacks empirical support and ignores practical realities.

A. IDEA provides thorough and detailed requirements for substantively appropriate special education and related services that provide meaningful remedy in many cases

IDEA confers upon students with disabilities "an enforceable substantive right to public education...."

Honig v. Doe, 484 U.S. 305, 310 (1988). As this Court has explained, the statute "represents an ambitious federal effort to promote the education of handicapped children, and was enacted in response to Congress' perception that a majority of handicapped in the United States 'were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to 'drop out.'" *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 178 (1982). IDEA provides detailed requirements for the development of an appropriate IEP for every student and procedural protections when school districts fail to follow statutory and regulatory directives. In 2011-12, more than six million students with disabilities had IEPs.[2]

IDEA and its implementing regulations often provide unambiguous mandates. For example, if a child in elementary school has a deficit in reading fluency skills, she is entitled to special education to remedy that deficit. *See, e.g., Doe v. Cape Elizabeth Sch. Dist.*, No. 15-1155, 2016 WL 4151377 (1st Cir. Aug. 5, 2016). If a child needs assistance with catheterization, the school will be required to provide nursing services. *Accord Irving Indep. Sch. Dist. v. Tatro*, 486 U.S. 883 (1984). If a child is nonverbal and therefore needs an augmentative communication device to communicate, IDEA requires that the school provide the device and appropriate training. *See Bd. of Educ. v. Michael R.*, No. 02 C 6098, 2005 U.S. Dist. LEXIS 17450, at *25 (N.D. Ill. Aug. 15, 2005) (district complied with IDEA by performing evaluation and providing augmentative

2. U.S. Dep't of Educ., Office of Civil Rights, Civil Rights Data Collection 2011-12 http://ocrdata.ed.gov/StateNationalEstimations/Estimations_2011_12 (last visited August 26, 2016).

communication devices to meet nonverbal student's needs). And, if a child needs a residential educational placement to benefit from education, the school district is required to fund the placement, transportation, and any other necessary supports. *See M.S. v. Utah Sch. for Deaf & Blind*, 822 F.3d 1128 (10th Cir. 2016). As the above cases show, IDEA is a powerful entitlement statute because it "requires school districts to provide the individualized services necessary to get a child to that floor [of access to education]," but what sets IDEA apart is that school districts must meet that mandate "regardless of the costs, administrative burdens, or program alterations required." *K.M. v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1097 (9th Cir. 2013). In contrast, under ADA/504, civil rights statutes, school districts are excused from "tak[ing] any action that . . . would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens." 28 C.F.R. § 35.164 (2015). Thus while this Court has rejected cost as a basis for denying a ventilator-dependent student continuous one-on-one nursing services during the school day, finding that cost was not a factor in construing the term "related services" in the IDEA context, *Cedar Rapids Cmty. Sch. Dist. v. Garret F.*, 526 U.S. 66, 77 (1999), a school district would argue that a family would have had less protections to pursue such a remedy under ADA/504 per 28 C.F.R. §35.164.

IDEA also contains unequivocal "stay put" protections that preclude school districts from making program and placement changes without approval by the parents. *See, e.g., Honig*, 484 U.S. 305; *Douglas v. Calif. Office of Hearings*, No. 15-15261 2016 WL 2818995, at *2. (9th Cir. May 13, 2016)(ALJ has authority to order medically

necessary occupational services necessary for special education benefit as compensatory education); *M.R. v. Ridley Sch. Dist.*, 744 F.3d 112, 115 (3d Cir. 2014), *cert. denied*, 135 S. Ct. 2309 (2015); *Doe v. East Lyme Bd. of Educ.*, 790 F.3d 440, 454 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 2022 (2016). Similarly, IDEA prevents the exclusion from education by suspension or expulsion of a child with a disability for manifestations of that disability. It outlines extensive protections and procedures to ensure discipline is not used as a way to deny children with disability access to their education. *See* 20 U.S.C. § 1415(k); *Dist. of Columbia v. Doe*, 611 F.3d 888, 890-91 (D.C. Cir. 2010).

Amici, having experience with tens of thousands of children in special education matters, know well that IDEA is a uniquely powerful statute that can and does provide children with significant entitlements. When denied those entitlements, parents and students with disabilities will not forego these remedies and evade exhausting administrative remedies for other legal claims unless such exhaustion cannot lead to the type of remedy they require.

B. IDEA provides significant remedies for statutory and regulatory violations which will be accessed when they are applicable

Requiring exhaustion only in cases where a school district has violated IDEA and an educationally related remedy is available and necessary to rectify the educationally-related harm is consistent with HCPA. Mandating exhaustion when there is no available administrative remedy, however, transforms the HCPA from a guarantee of access for protection of civil rights to a barrier to access.

Beyond the substantive requirements for programming contained within IDEA it also confers upon courts and administrative hearing officers broad equitable authority to provide appropriate educationally related relief. *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239 (2009). Such relief "would include a prospective injunction directing the school officials to develop and implement at public expense an [appropriate] IEP." *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 370 (1980). For those children whose parent have the means and the opportunity to provide special education and/or related services for their children while pursuing an IDEA remedy, relief could include reimbursement of funds spent on unilateral placements and services. *Id.*; *Forest Grove*, 557 U.S. at 240; *Leggett v. Dist. of Columbia*, 793 F.3d 59, 63-64 (D.C. Cir. 2015) (awarding placement at residential school that met student's needs when school district failed to identify alternative appropriate placement). For children whose parents are unable to afford or find alternative services, relief includes compensatory education. *L.O. v. N. Y. C. Dep't of Educ.*, 822 F.3d 95, 124 (2d Cir. 2016); *M.S.*, 822 F.3d at 1136; *B.D. v. Dist. of Columbia*, 817 F.3d 792, 799 (D.C. Cir. 2016) (remanding for calculation of compensatory education to ensure that student is in educational position he would have achieved absent the denial of FAPE); *See Douglas*, 2016 WL 2818995, at *2 (ALJ ordered compensatory education); *Doe v. East Lyme*, 790 F.3d at 454 (awarding reimbursement and compensatory education for violation of "stay put" protection). Compensatory education "may include services that would not ordinarily be available under IDEA, such as education beyond age 21." *B.D*, 817 F.3d at 800. *See also Draper v. Atlanta Indep. Sch. Sys.*, 518 F.3d 1275, 1290 (11th Cir. 2008) (compensatory education under IDEA is designed to place children with

disabilities in the same position they would have occupied but for the school district's violations of IDEA); *Ferren C. v. Sch. Dist. of Philadelphia*, 612 F.3d 712, 720 (3d Cir. 2010) (holding 24 year old student can only be fully compensated by awarding compensatory education).

In situations where a school district has failed to meet the substantive requirements of IDEA where compensatory education, or educationally related reimbursement could remedy some (if not all) of the alleged harm caused, students with disabilities are well positioned to take advantage of the administrative hearing officers' "broad equitable authority to provide appropriate relief." 20 U.S.C. §1415(i)(2)(C)(iii). And though IDEA's remedies are often meaningful, in many situations they are inappropriate and/or limited.

II. SECTION 504 AND ADA ADDRESS DISCRIMINATORY CONDUCT WITH PROCEDURES AND REMEDIES THAT ARE DISTINCT FROM AND ARE UNAVAILABLE UNDER IDEA

While IDEA creates a comprehensive standard and procedural framework by which students with disabilities will be educated in a meaningful way, Section 504 and ADA are civil rights statutes designed to end unlawful discrimination against individuals with disabilities, including students in public schools. Because the statutes were developed at different times, and with different purposes in mind, the mechanisms and remedies that have developed for each are distinct.

A. 504/ADA claims address discrimination and offer remedies not available under IDEA

Section 504 of the Rehabilitation Act was passed on September 26, 1973 and is codified at 29 U.S.C. § 701. It was the first piece of federal civil rights legislation directed at the protection of people with disabilities, and arguably paved the way for the passage of what is now known as IDEA and ADA. Section 504 is an antidiscrimination statute which provides that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . ." 29 U.S.C. § 794. Unlike the IDEA (which was enacted a few years after), Section 504 prohibits discriminatory conduct, policies, and programs, but creates no affirmative obligation on entitlements to ensure people with disabilities access.

In 1990, Congress passed the Americans with Disabilities Act, a landmark law protecting the rights of individuals with disabilities. Title II barred discrimination by public entities, including school districts.

In drafting ADA to be a comprehensive statute protecting people with disabilities from discrimination, Congress paid careful attention to the various civil rights laws that it had previously passed. Thus, Title I of ADA, employment, follows the same format as Title VII of the Civil Rights Act of 1964; employees who are covered by ADA must file complaints first with EEO agencies, just like employees who are covered by Title VII. Title III of ADA is modeled after Title II of the Civil Rights Act of

1964; in light of the extensive litigation over the definition of public accommodation, Congress provided a far more detailed definition of public accommodation. *Compare* 42 U.S.C. § 12181(7) *with* 42 U.S.C. § 2000a(b)&(c).

Like Section 504, in Title II of ADA, Congress prohibited discrimination by public agencies. Title II goes beyond Section 504 in applying to state and local government agencies regardless of whether they receive any federal funds; while Section 504 applies to private schools and other private businesses that receive federal funds. Because public schools receive federal funds and are public agencies, public schools are subject to the requirements of both Title II of ADA and Section 504.

Unlike IDEA, however, the scope of Section 504 and ADA is much broader, particularly for specific disability-related areas. In fact, ADA includes a mandate to eliminate discrimination against individuals with disabilities, and it required the U.S. Department of Justice to promulgate regulations to implement ADA to that end. 42 U.S.C. § 12134. Thus while IDEA may set the "basic floor of opportunity," ADA/504 may require more. To achieve that end, inclusive in both ADA and Section 504 is the ability to pursue damages to make victims of discrimination whole, and also to disincentivize discrimination at an institutional level. As such, the purpose and scope of remedy for these statutes differ.

B. ADA imposes different substantive obligations than IDEA

A good example of how ADA can impose a higher obligation on an agency to a person with a disability is

found in the case of *K.M. v. Tustin*. In that case, a student who was deaf sought Communication Access Real-time Translation services—an accommodation that provides word-for-word transcription—to enable her to follow classroom instruction. The district in that case declined to provide her with such supports and instead offered her different supports which did not provide her with the type of word-for-word transcription she felt she needed to be able to access instruction. *K.M. v. Tustin*, No. 10-1011, 2011 WL 2633673 (C.D. Cal. July 5, 2011), *rev'd in part*, 725 F.3d 1088 (9th Cir. 2013).

Under the *Rowley* analysis, the District's failure to provide the CART services was deemed to not have denied K.M. a FAPE because "[u]nder the *Rowley* 'educational benefit' standard, it cannot reasonably be said that K.M. was deprived of a FAPE. For one thing, as the ALJ held, Plaintiff has not demonstrated a need for CART services; rather, she has just shown that it would likely offer a benefit for her." *Id.* at *12. However, ADA and DOJ regulations regarding effective communications provide a completely different legal claim, and a good one at that. Those regulations require that communication be made equally accessible to people with communication disabilities, regardless of whether equal access is necessary for the child to benefit from education under *Rowley*. *See, e.g., K.M. ex rel. Bright* 725 F.3d at 1098.

In *K.M.*, the Ninth Circuit recognized that IDEA sets the "floor of access to education," while Title II and its implementing regulations "require public entities to take steps toward making existing services not just accessible, but *equally* accessible to people with communication disabilities." The court did "not find in either statute an

indication that Congress intended the statutes to interact in a mechanical fashion in the school context, automatically pretermitting any Title II claim where a school's IDEA obligation is satisfied." *Id.* at 1092.

A student with similar facts as Amy Rowley, whose IDEA claim is foreclosed by binding precedent from this Court, should be able to bring her ADA/504 effective communication claim in federal court without exhausting IDEA administrative remedies—particularly given that there will be cases where it is clear there is no denial of FAPE, as students with disabilities risk sanction for bringing cases that are not meritorious. *See* 20 U.S.C. § 1415(i)(3)(B)(i)(II) (allowing awards of reasonable attorneys' fees and costs to school districts when students with disabilities are found to have filed cases that are "frivolous, unreasonable, or without foundation.").

C. Congress chose not to impose an exhaustion requirement on 504/ADA claims

Unlike IDEA, which requires IDEA claims be heard by an independent hearing officer prior to any suit being brought before a state or federal court, Section 504's federal regulations do not require administrative due process exhaustion prior to bringing suit in federal court. *Compare* 20 U.S.C. § 1415(f)(3)(A) *with* 34 C.F.R. § 104.36 (2015). There are also other significant procedural differences in bringing forth cases under IDEA and Section 504, *See Payne v. Peninsula Sch. Dist.*, 653 F.3d 863, 872 (9th Cir. 2011). For example, while documents and experts need to be exchanged at least 5 days before an IDEA due process hearing, there is no such requirement for a Section 504 hearing. *Compare* 20 U.S.C. § 1415(f)(2) *with* 34 C.F.R. § 104.36.

Congress was familiar with IDEA, yet it chose not to require exhaustion of administrative remedies for all Title II or Section 504 claims involving public elementary and secondary education. Just as it provided for all Title I ADA[3] claims to be filed first with EEO agencies, it could have required all Title II ADA claims involving public elementary and secondary education claims to be brought first in the same due process proceedings provided for IDEA claims. It chose not to do so, but instead later amended HCPA to provide that ADA claims, like Section 504 claims, could be brought separately and without IDEA exhaustion unless they seek the same relief available under IDEA. *See* Individuals with Disabilities Education Act Amendments Act of 1997, 105 Pub. L. No 17, 111 Stat. 37. But beyond that, ADA regulations do not set out any due process procedures for ADA claims. Instead, apart from § 1415(*l*) Congress used the same format for ADA education claims as it did with Title VI and Title IX of the Civil Rights Act, which bar discrimination on the basis of race and national origin and sex, and allow individuals with disabilities to bring suit in federal court directly, without any administrative exhaustion. *See Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 255 (2009) ("Title IX has no administrative exhaustion requirement"); *Cannon v. Univ. of Chicago*, 441 U.S. 677, 707 n.41 (1979) (noting Title VI does not provide for exhaustion of administrative remedies).

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3. Notably, in Title I, of ADA, Congress required that coordination of ADA and Section 504 employment claims to "prevent imposition of inconsistent or conflicting standards," 42 U.S.C. § 12117(b), but did not provide any similar statutory requirement that ADA/Section 504 claims be consistent with IDEA claims.

Because Section 504 and ADA and civil rights statutes are designed to protect all individuals with disabilities, they cover all students who are eligible for IDEA, but they also cover other students with disabilities, students who do not need special education under IDEA. Thus, while all students who are IDEA-eligible are also Section 504-eligible by virtue of having a disability that significantly impairs their ability to learn, there are many students with disabilities under Section 504 and ADA who do not need special education and, therefore, are not eligible for IDEA. Some such students may choose to have Section 504 plans; there were 738,477 students on Section 504 plans without an IEP.[4]

III. MISAPPLYING SECTION 1415(*l*) TO REQUIRE EXHAUSTION FOR ALL EDUCATIONALLY-RELATED DISCRIMINATION CLAIMS UNLAWFULLY CONSTRICTS THE CIVIL RIGHTS OF INDIVIDUALS WITH DISABILITIES WHO ARE ENROLLED IN PUBLIC SCHOOLS

A. Congress passed §1415(*l*) to provide greater protections to IDEA-eligible Students, not detract from their civil rights

The legislative history of IDEA, Section 504, and ADA make clear that Congress understood that, while there would be significant interplay between these three statutes, they were complementary and not identical. Thus, there would be non-IDEA legal claims under Section 504 and ADA that would not require exhaustion of IDEA administrative remedies.

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4. http://ocrdata.ed.gov/StateNationalEstimations/Estimations_2011_12

Two years after it passed Section 504, Congress passed the Education for All Handicapped Children Act ("EHA"), IDEA's predecessor, which required education of all students with disabilities. P.L. 94-142 (1975). As discussed above, Congress passed this law because of its concern that students with disabilities were either being excluded from school or "sitting idly in regular classrooms." *See Rowley*, 458 U.S. at 179.

Due to the absence of a statute providing that Section 504 applied to EHA-eligible students and the comprehensive nature of EHA this Court restricted civil rights of EHA-eligible children in *Smith v. Robinson*, 468 U.S. 992 (1984). *Smith* involved a student, who had brought identical claims under the EHA and Section 504 claims and had been awarded attorney's fees under Section 504. The Court held that the EHA provided the exclusive avenue of relief for appropriate education claims. Thus, the plaintiff in *Smith* could not assert a claim for attorney's fees either under Section 504 or under 42 U.S.C. § 1983. The Court "emphasize[d] the narrowness of our holding," and specifically stated that it did not apply where "the EHA is not available or where § 504 guarantees rights greater than those available under EHA." *Id.* at 1021 n.8.

Congress swiftly responded with HCPA, so as "to reaffirm . . . the viability of Section 504, 42 U.S.C. § 1983, and other statutes as separate vehicles for ensuring the rights of handicapped children," and to restore attorney's fees for prevailing parents. H.R. Rep. No. 296, 99th Cong., 1st Sess. 4, 6-7 (1985); *see also* S. Rep. No. 112, 99th Cong., 1st Sess. 2, 15 (1985).

In introducing HCPA, Senator Weicker explained that "the Court has not only misinterpreted the congressional intent underlying the EHA, but it has also frustrated Congress' intent in enacting section 504 and 1983 which I and many members of this body assumed protected the civil rights claims of handicapped children." 130 Cong. Rec. S9078 (daily ed. July 24, 1984). He said that the legislative record and "a decade of unbroken executive branch interpretation. . . by the Nixon, Ford, Carter, and Reagan administrations –reflect a consistent assumption that Public Law 94-142[5] and Section 504 were intended to be **freestanding, complementary – but not identical** -- legislative acts." *Id.* (emphasis added). He further noted that when Congress added 505(b) of the Rehabilitation Act "there was no exception made for handicapped children seeking an education." *Id.* He specifically noted "the section 504 regulations defines [sic] several crucial terms – that is, appropriate education – more broadly than does Public Law 94-142." *Id.* at S9079.

Thus, HCPA unequivocally placed a single restriction on non-IDEA litigation under Section 504 and ADA, and requires potential litigants to exhaust administrative remedies only when seeking relief that is **also available under IDEA.** HCPA's exhaustion, as amended, requirement reads, in full:

> Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990

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5. The EHA at this time was cited interchangeably as P.L. 94-142.

> [42 U.S.C.A. § 12101 et seq.], title V of the Rehabilitation Act of 1973 [29 U.S.C.A. § 791 et seq.], or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

20 U.S.C. § 1415(*l*) (alterations in original).

It was never Congress' intent that eligibility (or possible eligibility) for IDEA substantive or procedural rights would detract from the rights of individuals with disabilities under Section 504.

Roughly five years later, in adopting ADA, Congress explained that its purposes in passing ADA included providing both "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" and "clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1)&(2). In light of the history of *Smith* and HCPA, it is easily understood that Congress could have required the millions of public school students receiving special education through IDEA to go through IDEA administrative proceedings for *any* ADA or Section 504 claim, but it did not.[6] In enacting ADA, Congress was familiar with both

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6. Indeed, when HCPA was adopted, the National School Boards Association proposed a broad exhaustion requirement for all

IDEA and HCPA, yet it deliberately chose not to exclude public school students from ADA or to require exhaustion of administrative remedies for all ADA Title II claims.[7] In contrast, Congress requires that all Title I ADA claims to be filed first with EEO agencies. Rather, well aware that IDEA students would also be protected by ADA and could have different legal claims under ADA, it simply amended the HCPA and limited the exhaustion requirement to those claims seeking "relief that is also available" under IDEA. Thus, like Section 504, ADA complements IDEA, so students with IEPs receive the same robust ADA protection as other individuals with disabilities.

This legislative history is bolstered by a clear reading of the statutory text of HCPA. "Statutory interpretation . . . begins with the text." *Ross v. Blake*, __ U.S. __, 136 S. Ct. 1850, 1856 (2016). In this case, as in *Ross*, the Court should distance itself from the Court of Appeals. The plain language of §1415(*l*), well known to the members of Congress enacting the ADA, establishes that Congress never meant to restrict the ability of an IDEA-eligible student to pursue remedies under other civil rights laws. Instead, Section 504 and ADA were intended to

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Section 504 and other federal claims if the administrative process could provide any relief. *Handicapped Children's Protection Act of 1985: Hearing Before the Subcomm. on the Handicapped of the Senate Comm. on Labor & Human Resources*, 99th Cong., 1st Sess. 27 (May 16, 1985) (statement of Jean Arnold, Esq. ("HCPA Senate Hearing"). That Congress declined to apply such an exhaustion requirement must be heeded.

7. The analysis of rights and obligations created by the ADA and Section 504 is substantially similar. *Vinson v. Thomas*, 288 F.3d 1145, 1152 n. 7 (9th Cir.2002); *accord McGary v. City of Portland*, 386 F.3d 1259, 1269 n. 7 (9th Cir.2004).

be complementary, but distinct protections for students with disabilities that required IDEA exhaustion only in circumstances where the parents sought relief that was available under IDEA.

B. Federal courts' misapplication of §1415(*l*) to deprive students with disabilities of access to ADA/504 remedies violates the federal courts' unflagging obligation to exercise jurisdiction of federal constitutional and statutory claims

Apart from public school students, individuals with disabilities can file ADA/504 claims without worrying about that an administrative exhaustion requirement will delay a court's exercise of its original jurisdiction under 28 U.S.C. § 1331. Courts have recognized that a plaintiff asserting Section 504 claims need not be exhausted because an administrative process could not provide the requested relief.[8] *Freed v. Conrail*, 201 F.3d 188, 192 (3d Cir. 2000) (referencing cases from First, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits). Similarly, Title II of ADA does not require exhaustion of remedies. *See* 28 C.F.R. § 35.172, Apx. A (according to United States Department of Justice analysis, Title II "complainant may elect to proceed with a private suit at any time").

Although HCPA restored the right of public school students who were dually covered by IDEA and Section 504 to bring Section 504 and other civil rights claims that

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8. The 1978 amendments to the Rehabilitation Act of 1973 incorporated the "remedies, procedures and rights set forth in title VI of the Civil Rights Act of 1964" for enforcing Section 504. 29 U.S.C. § 794a(a)(3).

had been eliminated by *Smith*, 468 U.S. at 1021 n.8, the Sixth Circuit's decision, if upheld, would require every public student with a disability to exhaust administrative remedies in every case, regardless of the merits of such an IDEA case. This approach only causes a denial or a delay of aggrieved students with disabilities access to court. This misapplication of §1415(*l*) is erroneous. Federal courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the [C]onstitution." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (Marshall, C.J.). Indeed, federal courts have a "virtually unflagging obligation" to exercise jurisdiction of properly presented federal constitutional and statutory claims. *Susan B. Anthony List v. Driehaus*, __ U.S. __, 134 S. Ct. 2334, 2347 (2014); *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976).

As discussed above, HCPA's plain language makes clear that exhaustion of IDEA administrative remedies is not required for all ADA/504 claims involving public school students, but only in the limited scenario where a student's ADA and Section 504 claims are in fact also IDEA claims 504 claims 504 claims are in fact also IDEA claims and seek relief under IDEA. Indeed, this was done because "Congress understood that parents and students affected by the IDEA would likely have issues with schools and school personnel that could be addressed—and perhaps could only be addressed—through a suit under . . . other federal laws," and, as such, the only time 20 U.S.C. Section *(l)* was intended to apply was, specifically, when "that filing of a civil action under [other] laws seek[s] relief that is also available under" the IDEA. *See Payne*, 653 F.3d at 872. The IDEA cannot provide relief if no IDEA claim has

been made, such as when a student is not eligible for IDEA protection, there is no IDEA dispute (as was the case in the underlying action), or the student has a ADA/504 claim that is different from an IDEA claim.

In fact, there are more than 700,000 students[9] who are "504-only," meaning their school districts have determined that they fall under the protection of Section 504 and not IDEA. All of those students have a disability that at least potentially falls within the covered disabilities set out in 20 U.S.C. § 1401(A)(i) and, therefore, under the Sixth Circuit's overly broad reading of the exhaustion clause, would be required to exhaust IDEA administrative process as a prerequisite to filing their ADA/504 claim. That is contrary to § 1415*(l)*.

The distinction between coverage by Section 504 and IDEA lies in 20 U.S.C. § 1410(A)(ii)'s requirement that, by reason of the disability, the student "needs special education and related services." IDEA provides funding for "special education and related services to children with disabilities." 20 U.S.C. § 1411(a)(1). Thus, courts routinely hold that students who have disabilities under § 1401(A)(i) are not eligible for IDEA and special education because they simply do not need special education and related services. *See, e.g., Alvin Indep. Sch. Dist. v. A.D. ex rel. Patricia F.*, 503 F.2d 378, 384 (5th Cir. 2007) (student with ADHD was not eligible for IDEA because he did not need special education); *Hood v. Encinitas Union Sch. Dist.*,

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9. As stated above: U.S. Dep't of Educ., Office of Civil Rights, Civil Rights Data Collection 2011-12 http://ocrdata.ed.gov/StateNationalEstimations/Estimations_2011_12 (last visited August 26, 2016).

486 F.3d 1099, 1109 (9th Cir. 2007) (student not eligible for IDEA; 504 plan was appropriate way to meet her needs). As the First Circuit recently stated, a child who needs only accommodations or services that are not part of special education to fulfill the objective of the need inquiry does not "need" special education. *Doe v. Cape Elizabeth*, 2016 WL 4151377, at *11.

A vivid illustration of how federal courts have used §1415(l) to avoid deciding ADA/504 claims is found in *S.D. v. Haddon Heights Bd. of Ed.*, No. 15-1804, 2016 WL 4394536 (3d Cir. Aug. 18, 2016).[10] In that case, S.D, whose medical impairments required frequent absences, was a student in the second academic year of a Section 504 plan. He had never been identified as eligible for IDEA by the school district that had prepared the Section 504 plans. The school district had the opportunity, and, in fact, the legal obligation, to determine whether the student was potentially eligible for IDEA at the time it made the initial determination that the student was entitled to a Section 504 plan. *See* 20 U.S.C. § 1412(3)("Child Find" obligation). Thus, by providing the Section 504 plan and not an IEP, the school district, not the parent, elected that Section 504 governed the student's claims.

Nonetheless the Third Circuit decision required him to exhaust his claims for discrimination and retaliation regarding his Section 504 plan under Section 504 and ADA "through the IDEA administrative process." 2016 WL 4394536, at * 6. The court explained that because the student's "alleged injuries are educational in nature and

10. Counsel for the appellants will be filing a petition for rehearing shortly.

implicate services within the purview of the IDEA, we conclude that Appellants' claims must be exhausted under the IDEA." *Id.* at *1. This decision both resuscitates and expands *Smith* to ADA. This approach was decisively rejected by Congress in adopting § 1415(*l*).

Given that the educational professionals had determined that a Section 504 plan was appropriate for S.D., and that Section 504 does not require exhaustion of administrative remedies, there was no basis in § 1415*(l)* to require the student to exhaust IDEA administrative proceedings that are inapplicable to students who are not eligible for IDEA. In fact, Section 504 has its own procedural safeguards, including different due process requirements, and exhaustion of those administrative remedies is not required prior to bringing a Section 504 suit. *See* 34 C.F.R. § 104.36 (2015). If Congress had intended to require 504-only students to exhaust administrative proceedings, it would have created Section 504 exhaustion requirements and provided for administrative proceedings, not those of a different law not applicable to their legal claims. Or it could have required that both statutes use the same administrative law proceedings. But it did not do so. Instead it acted to expand the ability of IDEA students to use other federal legal claims.

As this Court has observed, "it is for Congress, not this Court [or any court], to rewrite the statute." *Blount v. Rizzi*, 400 U.S. 410, 419 (1971). Congress was clear that HCPA did not strip students of their rights under Section 504; it did not grant courts the ability to transform any claim by any public school student with a disability into an IDEA claim because the claim had something to do with education and the student had a disability of some kind.

C. The misinterpretation of §1415(*l*) is causing real harm to students with disabilities and their parents

The potential ways in which school districts can use Section 1415(*l*) to deny students with disabilities and their families' vindication of their rights is well established.

1. School districts have denied students with disabilities and their families access to court by using § 1415(*l*) even in entirely non-IDEA related damage claims for rape, assault, and wrongful death

Last year a Missouri student (with an intellectual disability) sued her school district when she was the victim of repeated sexual assault and rape on school grounds during the 2013-2014 school year. *See Moore v. Kansas City Pub. Sch.*, No. 15-2617, 2016 WL 3629086 (8th Cir. July 7, 2016). The student brought her action in state court; the school district removed it to federal court on April 20, 2015,[11] arguing that her claims were under IDEA because of her disability status and the location of her abuse, and **sought dismissal for failure to exhaust administrative remedies.** The district court agreed that some of D.S.'s injuries "could potentially be redressed under the IDEA," decided it had original jurisdiction and dismissed the claims for lack of exhaustion. *Id.* at *2. Even though the Eighth Circuit recognized the detour through federal court was contrary to HCPA and reversed, justice for D.S.

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11. Civil Docket, *Moore v. Kansas City Pub. Sch.*, No. 4:45-Cv-00293-DW, (June 26, 2015), *rev'd*, No. 15-2617, 2016 WL 3629086 (8th Cir. July 7, 2016).

has been delayed more than fifteen months because of the school district's manipulation of 20 U.S.C. § 1415(*l*) and the district court's erroneous application of that provision. That is not only inconsistent with the plain language of the HCPA but shockingly destructive of its intent.

Along these lines, school districts have also tried to argue exhaustion is required when the parents' claims relates to the student's death. In *Moore v. Chilton County Board of Education*, a family sued the school system after their child committed suicide after being horrifically bullied at school, and by his classmates. 936 F. Supp. 2d 1300, 1308 (M.D. Ala. 2013). The school system tried to have the family's claim dismissed for failure to exhaust, but the district court held that exhaustion did not apply to the family's claim that the student's suicide was caused by the school's failure to protect the student from bullying and disability harassment under Section 504 and ADA. *Id.* *See also Taylor v. Altoona Area Sch. Dist.*, 737 F. Supp. 2d 474, 483, 490 (W.D. Pa. 2010) (exhaustion does not apply to claim student's death in school from asthma violated student's civil rights). Still, for damages claims, students and families not only have their damages award delayed but also have the amount reduced because they have to pay for significant amount of attorney time to defeat the school system's unsupportable effort to use §1415(*l*) to avoid liability.

These examples highlight the playing field the Sixth Circuit has created for families trying to vindicate their non-education related rights.

2. Students are harmed when courts misinterpret HCPA to require them to sacrifice early resolution of their IDEA claims for current services to maintain their right to pursue civil rights damages claims

Even when parties understand and agree that IDEA litigation is not in their best interests, courts still have found ways to deny rights vindication on §1415(*l*) grounds. For example, in *A.F. by Christine B. v. Espanola Pub. Sch.* 801 F.3d 1245, 1251 (10th Cir. 2015), the student was able to mediate her IDEA claim after filing IDEA due process complaint. She sought to press her damages claims for violations of civil rights laws after the settlement of her IDEA claim.

However, the school district still sought to delay or forestall any right to Section 504 and ADA remedy on exhaustion grounds even though it had elected to not obtain a release of ADA and Section 504 claims in the settlement agreement. Unfortunately for the student, the court of appeals dismissed the case. This was despite the settlement where the parties understood IDEA claims were already resolved, and despite the fact that the student's lawsuit sought damages – a remedy unavailable in an IDEA proceeding. In practice, this rule requires IDEA-eligible students in the Tenth Circuit to forego currently needed services (by way of mediation agreement, resolution session agreement, or other settlement mechanism) and instead pursue costly IDEA due process proceedings in order to vindicate their civil rights complaints. This clearly undermines the intent of the HCPA.

3. Misapplication of the HCPA harms public school students by depriving them of the rights and remedies that other individuals with disabilities who have a service dog enjoy

Students who are not subject to IDEA or who are not in an elementary or secondary school environments are able to vindicate their Section 504 and ADA rights in the manner intended by Congress. For example, in *Alejandro v. Palm Beach State College*, 843 F. Supp. 2d 1263, 1266 (S.D. Fla. 2011), a college student successfully vindicated her ADA right to access with a service dog in a little over a month.[12] In *Alboniga v. School Board of Broward County*, a case where the district court held that IDEA exhaustion was unnecessary because the ADA claim did not involve the school board's compliance with IDEA, the student was able to proceed directly to federal court on her ADA service animal claim and obtained a summary judgment decision in her favor in about eleven months.[13] 87 F. Supp. 3d 1319, 1329 (S.D. Fla. 2015). For other elementary and secondary public school students, however, the misapplication of §1415(*l*) causes unwarranted delays by requiring exhaustion of pointless due process hearings or responses to motions to dismiss for failing to exhaust.

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12. Ms. Alejandro, who was denied her right to bring her psychiatric service dog to college, filed her an ADA complaint in March 14th, 2011 in state court, the college removed it to federal court on March 29th, the federal judge set it down for a temporary injunction hearing, and by May 2, 2011, the college had filed a notice that it consented to provide the relief requested.

13. Docket Sheet, *Alboniga v. School Board of Broward County*, 87 F. Supp. 3d 1319, 1329 (S.D. Fla. 2015)

Requiring exhaustion of administrative remedies in service animal cases, where there is no IDEA claim available, is contrary to the HCPA. It creates a procedural hurdle that makes it more difficult for a public school student than for an older one attending college or even an adult going on a tour of a beer factory. *See, e.g., Johnson v. Gambrinus/Spoetz Brewery*, 116 F.3d 1052, 1064-65 (5th Cir. 1997)(holding that applying blanket no animal policy to guide dog violated ADA).

Here, the Sixth Circuit stated that Fry's IEP "could just as well have provided for her service animal," without identifying any legal claim that Fry could have used to require the school district to permit her to bring her service animal to school. *Fry* 788 F.3d at 629. This case does not involve a request for special education regarding the dog or a request that the service animal be considered a related service. The fact that the IEP could mention the service animal and any accommodations needed for the service animal in the statement of "supplementary aids and services,"[14] 20 U.S.C. § 1414(d)(1)(A)(i)(IV), does not suffice to show that the parents had a viable legal claim to require the school to permit the service animal to accompany their daughter. In contrast to IDEA and its regulations that say nothing at all about service animals, ADA Title II regulations define service animals and require public entities to allow access for service animals, providing a crystal clear legal claim. *See* 28 C.F.R. §§ 35.104 & 35.136.

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14. The term supplementary aids and services is defined as "aids, services, and other supports that are provided to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate . . .." 20 U.S.C. § 1401(33).

4. Requiring parents to participate in extensive litigation that they know will never be compensable under IDEA or ADA/504 as a prerequisite for a distinct ADA/504 claim is contrary to the language of HCPA as well as its purpose

The wasteful nature of the administrative hearings over nonexistent IDEA claims does not merely effect parents and children who bring those claims it also has an impact on other parents and children who need legal assistance and depend on the few legal services, protection and advocacy agencies, law school clinics, and other public interest law firms available to help them.

Most families of children receiving special education services have limited resources, both independently and because of the strain raising a child with a disability can have on a family's finances. One-quarter of students on IEPs have families with incomes below the poverty line and two-thirds have family incomes of $50,000 or less.[15] Congress understood that, absent a fee-shifting framework as part of the IDEA's due process procedures, many families would be unable to access counsel to undertake special education cases, and, without counsel, would face the nearly insurmountable to resolve their IDEA disputes.[16] Senator Weicker explained

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15. Elisa Hyman, *et al.*, *How IDEA Fails Families without Means: Causes and Corrections from the Frontlines of Special Education Lawyering*, 20 Am. U. J. Gender Soc. Pol'y & L 107, 112-13 (2011).

16. Recent studies have confirmed that without counsel, parents left on their own are without the experience or ability

that, without access to attorneys' fees, "the economic resources of parents become crucial to the protection of their children's rights regardless of the merits of the claim." 130 Cong. Rec. S9079 (daily ed. July 24, 1984). Senators specifically cited the example of Mary Tatro, who testified at a Senate hearing. She spoke about her family's experience in litigating *Tatro*, 468 U.S. 883. Her case was a "clear example of [a] school district extending judicial proceedings for more than 5 years in an attempt to force the Tatro family to drop their case due to the exorbitant cost of attorneys' fees." S. Rep. No. 99-112, 99th Cong., 1st Sess. at 17-18 (1985). *See also* Senate HCPA Hearing, at 24-25.[17] Here, the exorbitant cost of pointless administrative hearings that only delay a decision on the merits of ADA/504 claims will deter both parents and attorneys from pursuing meritorious cases.

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to "navigat[e] the intricacies of disability definitions, evaluations processes, the developments of IEPs, the complex procedural safeguards, among other provisions in the statute," and as a result, parents of students who were represented by counsel were far more likely to be successful in their IDEA claims. Lisa Lukasik, *Special Education Litigation: An Empirical Analysis of North Carolina's First Tier*, 118 W. Va. L. Rev. 735, 775 (2016). For example, the data from twelve years of North Carolina IDEA due process hearings showed that *Pro se* parents only prevailed on at least one issue in only 11.1% of the cases, and in full in only once, for 2.2% of the cases, and that was with the help of a non-attorney advocate. *Id.* In contrast, when represented by counsel, parents prevailed on at least one issue more than half the time (51.3%) and prevailed on the entire claim nearly one third of the time (30.8%). *Id.*

17. It was only because a public interest group was able to provide legal assistance after the family's funds ran out that they were able to pursue the appeal to the successful conclusion of a unanimous Supreme Court decision in their favor. Similarly, E.F. and her parents were fortunate that they were able to secure pro bono counsel.

In response to *Smith*, which held that fees were unavailable and reversed an award of fees to prevailing parents, Congress added a statutory fee provision, now codified at 20 U.S.C. § 1415(i)(3). As with other civil rights attorneys' fees, under IDEA, parents are only entitled to attorneys' fees if they prevail. *Id.* If the IDEA claim is meritless, parents not only waste precious time but also risk losing the financial resources devoted to litigating the hearing. Attorneys will be deterred from taking cases that require both protracted delays and noncompensable legal services.

Such an effect can be seen in the case of *K.M. ex rel. Bright v. Tustin Unified Sch. Dist.*, 78 F. Supp. 3d 1289, 1297 (C.D. Cal. 2015) involving fee litigation following victory in the Ninth Circuit. In that case, K.M. ultimately wanted to bring an ADA "effective communication" claim, and elected to exhaust an IDEA claim because the remedy sought could, in theory, include compensatory education in the form of the appropriate communication device and the denial of the appropriate communication system could be deemed a denial of FAPE under the IDEA. The student lost her claim for FAPE under the IDEA but prevailed in both the district court and Ninth Circuit that ultimately found in favor of K.M. on the grounds that ADA and Section 504's effective communication regulations imposed a higher standard than IDEA FAPE requirement. *See K.M.*, 725 F.3d at 1098. Even though the student in that case exhausted IDEA claims knowing that the relief sought was truly and more appropriately available under an ADA/504 claim, the student was penalized for doing so when she sought an award of attorneys' fees on her litigation. Though she had been required to exhaust so as to be able to bring her ADA/504 claims, the court held

that the parents were entitled to be paid for only 50% of the work done on the IDEA due process hearing.[18] *K.M.*, 78 F. Supp. 3d at 1297.

This conundrum is certainly not one that should be imposed onto cases where there are no overlapping issues that require the educational expertise presumed of administrative hearing officers. For example, while in *Hoeft v. Tucson Unified School District* the Ninth Circuit held that "[e]xhaustion of the administrative process allows for the exercise of discretion and educational expertise by state and local agencies, affords full exploration of technical educational issues, furthers development of a complete factual records, and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their programs for disabled children," 967 F.2d 1298, 1303 (9th Cir. 1992), such expertise is not required when dealing with non-educationally related claims of discrimination and retaliation. *Cf. K.M.*, 725 F.3d at 1101 (compliance with the IDEA has no impact on whether there was a violation under Section 504's (or the ADA's) antidiscrimination and anti-retaliation mandates). If ADA/504 claims have overlapping legal elements and meaningful relief (such as a denial of FAPE claim, *see* 34 C.F.R. § 104.33(b)(2)) is available, due process proceedings may serve these purposes. But when ADA/504 claims are distinct anti-discrimination claims, not claims

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18. Requiring parents' lawyers to undertake extensive work that they know will never be compensable under IDEA or ADA/504 as a prerequisite for a distinct ADA/Section 504 claim is contrary to the language of HCPA as well as its purpose. Congress was so concerned about the financial burden for parents and their counsel that it made the HCPA retroactive. P.L. 99-372, 100 Stat. 797 (Aug. 5, 1986).

regarding the sufficiency of an educational program, the administrative proceedings do not serve these purposes. The right to a service animal under ADA is not based on the student's educational needs under IDEA; the pertinent federal regulation makes no mention of education and, applies to all public entities. 28 C.F.R. § 35.136 (2015).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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